

Information Center, shall send a copy of this *Notice of Proposed Rulemaking*, including the *Initial Regulatory Flexibility Analysis*, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 95-184; MM Docket No. 92-260; FCC 04-228]

Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission addresses an amendment to a Note in its rules to include wiring behind sheet rock as an example, along with wiring located behind brick, metal conduit or cinder blocks, as wiring considered to be “physically inaccessible” as that term is used regarding the Commission’s cable television inside wiring rules. The consequence of that conclusion is to move the point at which a competing multichannel video programming distributor (“MVPD”) can gain access to wiring located behind sheet rock closer to the incumbent cable operator’s junction box, thereby facilitating competition between MVPD providers to serve an MDU. The Court of Appeals found that the Commission offered no reasoned basis for the amendment to add sheet rock and remanded the case back to the Commission for further consideration. This document seeks additional comment from interested parties regarding the Commission’s conclusion that cable wiring located behind sheet rock is “physically inaccessible” as that term is used in our rules.

DATES: Comments are due November 15, 2004 and reply comments are due December 6, 2004.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. See

Supplementary Information for filing instructions.

FOR FURTHER INFORMATION CONTACT:

Karen A. Kosar, Media Bureau at (202) 418-1053 or via internet at karen.kosar@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission’s Further Notice of Proposed Rule Making (FNPRM), CS Docket No. 95-184 and MM Docket No. 92-260, adopted September 22, 2004 and released September 29, 2004. The full text is available for inspection and copying during normal business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW, CY-A267, Washington, DC 20554. Persons with disabilities who need assistance in the FCC Reference center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-7365 (TTY), or bccline@fcc.gov. Documents are also available from the Commission’s Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of documents also may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone (202) 488-5300 or (800) 378-3160, e-mail fcc@bcpiweb.com, or via its Web site <http://www.bcpiweb.com>. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call consumer and Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY).

1. This Further Notice of Proposed Rule Making (FNPRM) is issued in response to a decision issued by the United States Court of Appeals for the District of Columbia Circuit regarding amendment of the Commission’s cable television inside wiring rules. In the First Order on Reconsideration and Second Report and Order in the proceeding, the Commission, in part, modified its rules to provide that home run wiring located behind sheet rock is considered to be physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring. At issue in the Appeals Court decision is the Commission’s amendment of the Note to § 76.5(mm)(4) of the Commission’s rules to indicate that wiring embedded in sheet rock would be considered physically inaccessible. Prior to its Reconsideration Order and amendment of the Note to § 76.5(mm)(4), the Commission determined under its definition of “physically inaccessible,” for example, that wiring embedded in

brick, metal conduit or cinder blocks would likely be physically inaccessible; wiring simply enclosed within hallway molding would not. By expanding the Note to § 76.5(mm)(4) to include sheet rock in its Reconsideration Order, the Court of Appeals found that the Commission offered no reasoned basis for the amendment and remanded the case to the Commission for further consideration.

2. In response to the Court’s decision, the FNPRM seeks additional comment on whether accessing inside wiring behind sheet rock (1) will involve significant modification of or damage to preexisting structural elements and (2) will add significantly to the difficulty and cost of wiring an MDU. The FNPRM seeks comment as to whether our conclusions in general as stated in the Reconsideration Order with regard to § 76.5(mm)(4) of the rules and the applicable Note are correct. In addition, the FNPRM seeks comment as to whether there is an additional or more appropriate standard that would support the amendment of our rule in light of the Court’s remand. The FNPRM also seeks comment as to whether any specific language changes or eliminations should be made to our rule.

I. Procedural Matters

A. Initial Regulatory Flexibility Analysis

3. As required by the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this document. The IRFA is set forth in the below. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the FNPRM, and they should have a separate and distinct heading designating them as responses to the IRFA.

B. Paperwork Reduction Act

4. This FNPRM does not contain proposed information collections subject to the Paperwork Reduction Act of 1995 (“PRA”), Public Law 104-13. In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

C. *Ex Parte* Rules—Permit-but-Disclose

5. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 CFR 1.1202, 1.1203, and 1.1206.

D. Comment Information

6. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before November 15, 2004 and reply comments on or before December 6, 2004. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

7. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC, 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners.

Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC, 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

8. Parties also must serve either one copy of each filing via e-mail or two paper copies to Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, telephone (202) 488-5300 or (800) 378-3160, e-mail fcc@bcpiweb.com, or via its Web site at <http://www.bcpiweb.com>. In addition, parties should serve one copy of each filing via e-mail or one paper copy to Karen Kosar, Media Bureau, 445 12th Street, SW., 4-C453, Washington, DC, 20554. Washington, DC, 20554.

II. Initial Regulatory Flexibility Analysis

9. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"), the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules addressed in the Further Notice of Proposed Rulemaking ("FNPRM"). Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed in accordance with the same filing deadlines for comments on the FNPRM.

A. Need for and Objectives of the Further Notice of Proposed Rulemaking

10. This FNPRM is initiated in response to a decision issued by the United States Court of Appeals for the District of Columbia regarding amendment of the Commission's cable television inside wiring rules. In its First Order on Reconsideration and Second Report and Order in this proceeding, the Commission modified its rules to provide that home run wiring located behind sheet rock is considered to be physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring in multiple dwelling units ("MDUs"). Specifically, the Commission amended the Note to § 76.5(mm)(4) of the rules to include wiring behind sheet rock as an example, along with wiring located behind brick, metal conduit or cinder blocks, as wiring considered to be "physically

inaccessible" as that term is used in § 76.5(mm)(4) of the rules and the appended Note. The consequence of that conclusion is to move the point at which a competing multichannel video programming distributor ("MVPD") can gain access to wiring located behind sheet rock closer to the incumbent cable operator's junction box, thereby facilitating competition between MVPD providers to serve an MDU. The Court of Appeals found that the Commission offered no reasoned basis for the amendment to add sheet rock as an example of material to be considered as a "preexisting structural element" in defining physical inaccessibility and remanded the case to the Commission for further consideration.

B. Description and Estimate of the Number of Small Entities Impacted

11. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

12. *Cable and Other Program Distribution.* This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed a small business size standard for this census category, which includes all such companies generating \$12.5 million or less in revenue annually. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies involved herein.

13. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business

size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide. The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies involved herein.

14. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." The Commission has determined that there are 67,700,000 subscribers in the United States. Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate. Based on the available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, and therefore are unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

15. *Cable Television Relay Service*. This service includes transmitters generally used to relay cable programming within cable television system distribution systems. The SBA has defined a small business size standard for Cable and Other Program Distribution, consisting of all such companies having annual receipts of no more than \$12.5 million. According to Census Bureau data for 1997, there were 1,311 firms in the industry category Cable and Other Program Distribution, total, that operated for the entire year. Of this total, 1,180 firms had annual

receipts of \$10 million or less, and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Thus, under this standard, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies involved herein.

16. *Local Multipoint Distribution Service*. Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. The SBA has approved these small business size standards in the context of LMDS auctions. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

17. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service*. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately

392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.

18. In addition, and as noted *supra*, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under \$10 million, and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

19. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

20. *Open Video Services*. Open Video Service (OVS) systems provide subscription services. The SBA has created a small business size standard for Cable and Other Program Distribution. This standard provides that a small entity is one with \$12.5 million or less in annual receipts. The Commission has certified approximately 100 OVS operators to serve 75 areas, and some of these are currently providing service. Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that those OVS operators remaining might qualify as small businesses that may be affected by the rules and policies proposed herein.

C. Description of Projected Recording, Recordkeeping, and Other Compliance Requirements

21. The retention or deletion of the word "sheet rock" to the Note to § 76.5(mm)(4) of the Commission's rules would not impose any additional reporting or recordkeeping

requirements. With regard to other compliance requirements, we note as indicated above, that the FNPRM is initiated in response to a decision issued by the United States Court of Appeals for the District of Columbia regarding amendment of the Commission's cable television inside wiring rules. The Court seeks support for the Commission's decision to add wiring behind sheet rock as an example of wiring considered to be "physically inaccessible" as that term is defined by § 76.5(mm)(4) of the Commission's rules and the appended Note. As stated, the consequence of the Commission's underlying decision is to move the point at which a competing video provider can gain access to wiring located behind sheet rock closer to the incumbent cable operator's junction box, thereby facilitating competition between video providers to serve an MDU.

22. No alternatives to our proposal herein are mentioned because we do not anticipate a negative impact on smaller entities. However, we welcome comment on modifications of the

Commission's conclusions if based on evidence of potential differential impact.

D. Steps Taken To Minimize Significant Impact on Small Entities and Significant Alternatives Considered

23. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

E. Federal Rules Which Duplicate, Overlap, or Conflict With the Commission's Rules and Policies Herein

24. None.

III. Ordering Clauses

25. *It is ordered* that, pursuant to sections 1, 4(i), 601, 623, 624, and 632 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 521, 543, 544 and 552 *comment is hereby sought* on the analysis, questions, discussions and statement of issues in this Further Notice of Proposed Rulemaking.

26. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of the Further Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

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